Supreme Court, U.S.
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No. 95-964

In The

Supreme Court of the United States

October Term, 1995

POLK COUNTY, IOWA, A MUNICIPAL CORPORATION; RAY SEARS, FORMER COUNTY ADMINISTRATOR OF POLK COUNTY; AND POLK COUNTY BOARD OF SUPERVISORS,

Petitioners,

vs.

ISAIAH BROWN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

NATHAN W. KELLUM
Counsel of Record
STEPHEN M. CRAMPTON
AMERICAN FAMILY ASSOCIATION
LAW CENTER
107 Parkgate Drive
P.O. Drawer 2440
Tupelo, MS 38803
(601) 680-3886

ROBERT A. WRIGHT, JR.
WRIGHT & WRIGHT
Two Ruan Center
601 Locust, Suite 921
Des Moines, IA 50309
(515) 252-7578

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

12 pp

QUESTION PRESENTED

Whether the occasional prayers and affirmations of faith engaged in by Mr. Brown could be reasonably accommodated by Polk County without undue hardship under the mandates of Title VII of the Civil Rights Act of 1964.

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BRIEF IN OPPOSITION

Respondent Isaiah Brown respectfully requests that this Court deny the petition for writ of certiorari that seeks review of the Court of Appeals for the Eighth Circuit en banc opinion below.

STATUTES INVOLVED

42 U.S.C. § 2000e(j) provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e-(2)(a)(1) provides:

> It shall be an unlawful employment practice for an employer – to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Iowa Code § 216.6(1)(a) provides:

> It shall be an unfair or discriminatory practice for any person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race,

creed, color, sex, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation. If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection.

STATEMENT OF THE CASE

Mr. Brown relies and refers the Court to the recitation of facts set forth in the opinion of the court below. See App. 46-48.[1]

[1] A couple of misstatements of fact found in the petition must nonetheless be addressed. First, the assertion that Mr. Brown was fired because "Brown had lost control of his department" is unfounded. Petition at p. 4. As noted by the court below, the county administrator himself testified that religious activities was "a factor" in the decision to fire Mr. Brown. App. 59. Second, Polk County mistakenly states that the June 1990 reprimand was tied to a county policy prohibiting personal use of resources. Petition at p. 5. The reprimand itself reveals that the scolding was based purely on religious activities deemed inappropriate by Polk County. App. 54.

REASONS TO DENY THE WRIT

I. The Facts of this Case Do Not Present the Issues Raised by Polk County

A. Allowing the Spontaneous and Infrequent Prayers of Mr. Brown Would Not Create a Hardship on Polk County.

Polk County suggests in its brief that the Court of Appeals upheld the right of a government employee to "spend their time from nine to five preaching and praying [rather] than providing for the effective and efficient delivery of public services." Petition at p. 10. This is incorrect. The Court of Appeals only reasoned that accommodating the occasional prayers and affirmations of faith by Mr. Brown would not constitute an undue hardship on Polk County in this particular case.[2]

Polk County was required to affirmatively show that permitting the sporadic religious activities of Mr. Brown could not be done without undue hardship. The hardship shown must necessarily be real, not hypothetical. *Cook v. Chrysler Corp.*, 981 F. 2d 336, 339 (8th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2963, 125 L. Ed. 2d 663 (1993). Polk County points to supposed "lost efficiency" in the form of other jobs or higher wages. The record, however, is void of any such effect.

The notion that employees would be needed to cover for Mr. Brown is speculative at best. Likewise, there is no reasonable basis for this Court to assume that Polk

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[2] As noted by the appellate court, Polk County failed to make any attempt to accommodate. App. 52.

County would have to hire a new person or pay overtime as a result of Mr. Brown's activities. Indeed, as the absence of any record citations indicate, there is no proof that the infrequent activities of Mr. Brown made him any less effective at his job or that the subject prayers and affirmations of faith encountered in this case could have created any costs to the county whatsoever. Hence, a mathematical deduction presupposing that any time spent by an employee praying or affirming faith per force costs the county that time is invalid at its very base.

Polk County jettisons the purported hardship pursued before the District Court, the Court of Appeals panel and the Court of Appeals en banc, that being polarization between Christians and non-Christians in the office.[3] Evidence presented at trial was geared toward this contention. The novel argument presented to this Court is pure conjecture, completely lacking of any factual support.[4] As such, the claim of undue hardship is misplaced.

B. Permitting Prayers and Affirmations of Faith Do Not Violate the Establishment Clause.

Contrary to its assertion, Polk County is not required by the Court of Appeal's decision to "pay" Mr. Brown to

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[3] The court below dismissed this assertion as "insufficiently real." App. 58.

[4] Similarly, there is a dearth of any evidence that Mr. Brown wished to use public resources for religious reasons.

pray and proselytize.[5] Mr. Brown was employed by Polk County to serve as director of the Polk County Information Services Department. He was responsible for planning and organizing Polk County data processing operations. App. 4-5. The salary paid to Mr. Brown was in exchange for these services, not for prayer or proselytizing.

Moreover, merely allowing Mr. Brown to engage in prayers and affirmations of faith is not tantamount to an endorsement of religion. The reason is uncomplicated. The subject prayers and affirmations were not instituted by Polk County, but by Mr. Brown as a private citizen. There is no constitutional requirement that a government employee be forced to forego religious practices for continued employment. The U.S. Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984). Accordingly, the establishment clause must be interpreted to accommodate the free exercise of religion. *Katcoff v. Marsh*, 755 F. 2d 223, 233 (2nd Cir. 1985).

For example, in *Hobbie v. Unemployment Appeals Com'n of Florida*, 480 U.S. 136, 107 S. Ct. 1046, 94 L. Ed. 2d 190 (1987), this Court specifically rejected the argument that the awarding of benefits in recognition of an employee's religious rights would violate the establishment clause. The Court concluded that the government

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[5] Polk County asserts: "This is a situation where the government pays the funds directly to the person engaging in the religious activities, with sole purpose of compensating the person for engaging in a religious activity." Petition at p. 16.

may accommodate religious practices without violating the establishment clause. *Hobbie*, 480 U.S. at 145. Similarly, in *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981), payment of benefits to an employee who quit work because of religious beliefs was held not violative of the establishment clause. *Thomas*, 450 U.S. at 719-720.[6]

Thusly, there is no need for this Court to determine whether an actual or potential establishment clause violation could amount to an undue hardship under Title VII. An establishment clause violation could not possibly exist.

II. The Appellate Court Decision is in Harmony with Precedent of this Court and Other Courts

The Eighth Circuit en banc decision is not in conflict with any other court. The opinion is directly in line with the decisions cited by Polk County, *Trans World Airlines v. Hardison*, 432 U.S. 63, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977), and *Ansonia Bd. of Ed. v. Philbrook*, 479 U.S. 60, 107 S. Ct. 367, 93 L. Ed. 2d 305 (1986). The analysis utilized in those decisions and other decisions before this Court for

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[6] Polk County does not challenge the portion of the ruling relating to Mr. Brown's constitutional claims unconnected with his termination. In that portion, the appellate court deduced: "The defendants would have us hold that their 'interest' in avoiding a claim against them that they have violated the establishment clause allows them to prohibit religious expression altogether in their workplaces. Such a position is too extravagant to maintain, for it gives a dominance to the establishment clause that it does not have and that would allow it to triumph the free exercise clause." App. 63.

determining a Title VII violation was faithfully applied by the Court of Appeals in this case.[7] Polk County cites no other circuit decisions with a contrary view. And just as certain, the opinion is not in conflict with the district court opinion of *Spratt v. Kent County*, 621 F.Supp. 594, 601 (W.D. Mich. 1985), *aff'd*, 810 F. 2d 203 (6th Cir. 1986), *cert. denied*, 480 U.S. 934, 107 S. Ct. 1574, 94 L. Ed. 2d 766 (1987). The differing results are explained by the differing facts.

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[7] Polk County also urges this Court to adopt the *Pickering* balancing test for the Title VII claim addressed here. Essentially, Polk County requests that this Court reverse every prior ruling dealing with Title VII, and abandon the analysis that has been consistently used by this Court. The position is untenable. In any event, every indication is that the result would be the same.

CONCLUSION

In sum, Polk County has failed to present this Court with a justifiable reason for granting certiorari. A reversal of the court below would confuse the law and upset settled expectations. The petition ought to be denied.

Respectfully submitted,

NATHAN W. KELLUM
Counsel of Record
STEPHEN M. CRAMPTON
AMERICAN FAMILY ASSOCIATION
LAW CENTER
107 Parkgate Drive
P.O. Drawer 2440
Tupelo, MS 38803
(601) 680-3886

ROBERT A. WRIGHT, JR.
WRIGHT & WRIGHT
Two Ruan Center
601 Locust, Suite 921
Des Moines, IA 50309
(515) 252-7578

Attorneys for Respondent